(5)

Supreme Court, U.S.
FILED
APR 28 1999
CLERK

No. 98-1018

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1998

CHOWCHILLA WATER DISTRICT AND MADERA IRRIGATION DISTRICT

Petitioners

vs,

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

Respondents

On Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF TO THE RESPONDENTS' BRIEF IN OPPOSITION

GREEN, GREEN & RIGBY
Denslow Green
Counsel of Record
P.O. Box 1019
Madera, CA. 93639
Phone: 559-674-5656
Fax: 559-674-8228

RR

TABLE OF CONTENTS

I. INTRODUCTION 1

A. THE COURT'S RULES. 1

B. RESPONDENTS' BRIEF IN OPPOSITION FAILED TO RESPOND TO PETITIONERS' PETITION. 1

II. THE IMPORTANCE OF A DECISION BY THIS COURT ON THE PREEMPTION ISSUE 2

III. CONGRESSIONAL INTENT 4

A. WHAT DID CONGRESS MEAN? 4

B. FEDERAL SUPREMACY 5

IV. CONCLUSION 6

TABLE OF AUTHORITIES

CASES: **Page:**

California v. United States 438 US 645, 57 L Ed 2d 1018, 96 S Ct. 2985 3

City of Fresno v. State of California, United States of America et al. 272 US 627, 10 L. ed 2d 28, 83 S Ct. 996 (1963) 2

Dugan v. Rank, 372 US 609, 83 S Ct 999, 10 L Ed 2d 15, (1963) 2

Ivanhoe Irrigation District v. McCracken, 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 (1950) 2

United States v, Gerlach Live Stock Co. 339 U.S. 725, 94 L Ed 1231 (1950) 2, 4

United States v. Union Pacific Ry. Co. 91 U S 72, 23 L Ed 221 4

STATUTES:

§ 3406(c) of the CVPIA 4, 5

California Water Code § 5937 ..... 2, 4

I.
INTRODUCTION

A. THE COURT'S RULES.

Rule 15 2. provides in part:

> "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatements made in the petition."

B. RESPONDENTS' BRIEF IN OPPOSITION FAILED TO RESPOND TO PETITIONERS' PETITION.

With the exception of footnote 15, no mention of Petitioners' Petition was made in Respondents' Brief in Opposition. In this footnote, no mention was made of Petitioners' assertion that prior congressional intent had declared that the Project was to operate with a dry river between Gravelly Ford and Mendota Pool and that this prior intent was carried forward in the CVPIA.

Nor did the Brief in Opposition mention the assertion in Petitioners' Petition that Chowchilla and Madera had vested rights of renewal by reason of their

1939 Contract which precluded Section 7 consultation prior to renewal.

If these were misstatements of fact or law, Respondents had the duty to address them. This they failed to do.

II.
THE IMPORTANCE OF A DECISION BY THIS COURT ON THE PREEMPTION ISSUE

This Court on four occasions has made decisions affecting the Friant Division of the Central Valley Project. These are: *United States v, Gerlach Live Stock Company* 339 U.S. 725, 94 L Ed 1231 (1950); *Ivanhoe Irrigation District v. McCracken,* 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 (1950); *Dugan v. Rank,* 372 US 609, 83 S Ct 999, 10 L Ed 2d 15, (1963) and *City of Fresno v. State of California, United States of America et al.* 272 US 627, 10 L. ed 2d 28, 83 S Ct. 996 (1963).

The questions presented in this case are of equal, if not greater, importance than those previously decided by this Court.

If, contrary to the dictates of Congress, under § 5937 the Secretary is required to re-establish a salmon run that has not existed for well over fifty years, a million acres of the most productive farm lands in the United States will be deprived of a water supply sufficient to grow crops. Trees and vines in ar-

eas where there is no groundwater supply will die. Crops on lands, which do have a groundwater supply, will linger longer until that supply is exhausted. As stated in *California v. United States* 438 US 645, 57 L Ed 2d 1018, 96 S Ct. 2985 at 57 L Ed 2d:

"The prime value in our national economy of the lands of summer drought on the Pacific Coast is as a source of plant products that require mild winters and long growing seasons. Citrus fruits, the less hardy deciduous fruits, fresh vegetables in winter-these are their most important contributions at present. Rainless summers make possible the inexpensive drying of fruits, which puts into the market prunes, raisins, dried peaches, and apricots. In its present relation to American economy in general, the primary technical problem of agriculture in the Pacific Coast States is to make increasingly more effective use of the mild winters and the long growing season in the face of the **great obstacle presented by the rainless summers. To overcome that obstacle supplementary irrigation is necessary. Hence the key position of water in Pacific Coast agriculture."** (Emphasis added)

This issue alone is sufficient for the Court to grant certiorari. When the other issues are added, it becomes even more compelling.

*****

*****

*****

III.
CONGRESSIONAL INTENT

A. WHAT DID CONGRESS MEAN?

When Congress adopted § 3406(c) of the CVPIA and forbade the Secretary from releasing water from Friant to re-establish fish life until a plan which was "reasonable, prudent and feasible" was adopted and Congress gave authority to the Secretary to release flows, did it intend that contrary to this edict the same result could be accomplished by State action under § 5937?

Congressional intent is to be ascertained with respect to conditions that existed at the time of enactment of the statute. As stated in *United States v. Union Pacific Ry. Co.* 91 U S 72, 23 L Ed 221:

> "... courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it."

The history of the times surrounding the adoption of the CVPIA § 3406(c) was that for well over fifty years the River was dry between Gravelly Ford and Mendota Pool with the knowledge and consent of Congress. Congressional purpose was made manifestly clear when they gave instructions to the Secretary.

B. FEDERAL SUPREMACY.

In *Ivanhoe Irrigation District v.McCracken,* 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 at 1325,quoting from *Nebraska v. Wyoming* 325 U S 589, 89 L Ed 1815, the Court stated in referring to § 5 of the 1902 Act (acreage limitation):

'"We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system. Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that [no] right to the use of water shall be sold for a tract exceeding one hundred and sixty acres to any one landowner . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. To read § 8 to the contrary would require the Secretary to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century. Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5'"

If, in the foregoing quotation we were to substitute § 3406(c) of the CVPIA which requires first a plan that is "reasonable, prudent and feasible" and then further action by Congress before any water is released from the dam for restoration of fish by the Secretary,

for § 5 of the 1902 Act, the Court would again adopt the proper approach. "To read § 8 to the contrary would require the Secretary to violate" §3406(c).

IV.
CONCLUSION

The whole purpose of the Central Valley Project was to provide irrigation water for the East side of the San Joaquin Valley, by delivery of the full flows of the San Joaquin River diverted at Friant Dam, delivered through the Madera and Friant Kern Canals.

The cost of doing this was to create a dry river between Gravelly Ford and Mendota Pool.

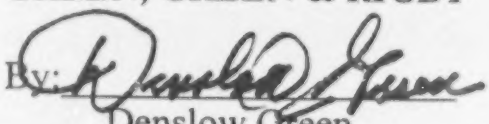
Respondents seek to undo this Congressional Project by application of a State law that would require releases from Friant Dam to re-establish a Salmon run which has been non-existent for over fifty years.

To do this, they must apply State law under Section 8 to override a specific congressional directive to the Secretary of Interior.

Certiorari should be granted.

Dated: April 27, 1999

GREEN, GREEN & RIGBY

By: 

Denslow Green
Attorney for Petitioners
Chowchilla Water District
and Madera Irrigation Dis-
trict